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REPORT OF THE EXPERT MEETING ON AIR TRANSPORT SERVICES: CLARIFYING ISSUES TO DEFINE THE ELEMENTS OF THE POSITIVE AGENDA OF DEVELOPING COUNTRIES AS REGARDS BOTH THE GATS AND SPECIFIC SECTOR NEGOTIATIONS OF INTEREST TO THEM

Held at the Palais des Nations, Geneva,
from 21 to 23 June 1999

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I. AGREED CONCLUSIONS [1]

The Expert Meeting reached the following conclusions on issues which should be taken into account in building the positive agenda for developing countries in the air transport sector:

A. Progressive liberalization under current arrangements

1. The current Annex on Air Transport in the General Agreement on Trade in Services (GATS) rules out its application to traffic rights and services related to traffic rights. The Annex does, however, list three services related to air transport to which the rules of the GATS do apply. Commitments so far in these three sectors are limited.

2. With a view to identifying possible benefits from further commitments in the areas already listed in paragraph 3 of the Annex, the GATS signatories are urged to review their commitments and to consider the options for including these sectors in their packages of offers and requests.

3. In a number of other areas, the application of the GATS may be unclear. There is a need to clarify the coverage under the existing wording by considering a more detailed classification of the air transport sector, including related activities. The coverage of the Agreement can then be tested more easily.

4. Options for extending the coverage of items similar to those now listed in paragraph 3 of the Annex could then also be considered.

5. This work, involving cooperation among the International Air Transport Association (IATA), the International Civil Aviation Organization (ICAO) and the World Trade Organization (WTO), should include the comparison of the sectoral classifications now used in the GATS with those in common use in the industry.

B. Considering ways of extending the coverage

6. Options for the inclusion of air transport in the GATS should continue to be explored in order to understand more completely the role that the GATS can play in resolving the issues outlined above. In order to have an impact on the debate on air transport in the WTO Council for Trade in Services, participants must have an appreciation of the options and their implications.

7. Under the GATS, WTO members may claim exemptions from most-favoured-nation (MFN) treatment for some parts of the sector. Commitments on market access and national treatment apply only to those parts of the sector that are bound in each country's schedules.

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[1] As adopted by the Expert Meeting at its closing plenary meeting on 23 June 1999.

8. In preparing for the review of the Annex, WTO members might wish to explore, among others, the following options:

(a) It may be the case that a large number of economies wish to exclude, in particular, mode 1 (that is, supply across a national border, which means that the airline provides the service from its home base). If so, the current Annex could be amended to:

(i) specify that the exemption applies only to this mode, and

(ii) make clear which elements of the activity are included (related only to traffic rights, but to be defined more precisely as a consequence of the work done on the definition of the sector);

(b) Mode 2, which refers to consumption abroad, may be less controversial, but its scope has to be tested in the negotiation process;

(c) Mode 3, which refers to commercial presence, is increasingly common. Coverage of this mode by the GATS adds to the adjustment options of airlines based in developed economies and also adds to the modes of participation by developing economies. There is evidence that rules on establishment that are applied in the bilateral system are becoming more flexible and more open. Scheduling this mode of delivery would recognize this fact and provide the benefits of the GATS, in terms of MFN, market access and national treatment;

(d) Commitments with respect to the movement of persons under mode 4 would also be relevant;

(e) This approach to treatment of air transport would have to consider the consistency between the GATS approach to defining national identity and that applied in the bilateral air transport system. Dealing with competition policy issues also requires the identification of the home base of the airline, since it will be important to be able to identify a jurisdiction to which a complaint may be taken. The flexibility already evident in the definition of carrier identity in the bilateral agreements indicates that this issue need not be a significant constraint.

9. Members may also wish to consider including under paragraph 3 of the Annex additional specific air transport services and activities, as well as reducing the list of specific services, activities and/or traffic rights under paragraph 2 of the Annex, taking into account the results of the work set out in paragraphs 2 to 5 above.

C. Treatment of developing countries

10. In recognition of the concern expressed by developing countries on the need to improve their participation in air transport markets on a level playing field, a number of suggestions have been developed by ICAO, IATA, specialized regional organizations and member States for mechanisms to achieve that goal. These mechanisms represent transitional measures, and it is

recommended that they be studied and considered. The organizations responsible for air transport should be invited to take part in the development and management of these options.

11. The ICAO secretariat has developed a number of recommendations for mechanisms through which this support could be provided. These refer to the terms of market access, the application of criteria on ownership and control, processes of slot allocation, and doing business matters. These recommendations should be re-examined. Implementation of these options is a matter for individual economies.

12. In addition, there are important contributions which can be made to capacity-building, for example, with respect to competition policy, standards (including those related to environmental issues, such as noise and industry doing-business standards) and human resource development. It is recommended that cooperation for these purposes be pursued in a number of modes, including under the auspices of ICAO and IATA, where relevant.

13. Consideration of the application of the GATS to air transport should also cover its implications for special provisions for developing country participation. Article IV obliges members to facilitate the increasing participation of developing countries in world trade in services through negotiated specific commitments, such as those relating to access to technology on a commercial basis and improvement of access to distribution channels and information networks. It would be useful to evaluate how Article IV has worked in general as well as its possible application to the air transport sector.

14. Article XXV refers to the scope for the WTO Council for Trade in Services to provide technical assistance by the WTO secretariat. This will be valuable in the context of making choices about documenting commitments if and when the air transport exemption is removed.

D. Dealing with competition policy and other regulatory issues

15. It is important to deal with competition policy problems and with the application of domestic regulation, which can lead to demands for conflict resolution. Difficulties have been experienced in conflict resolution in the bilateral system. Conflicts could arise from commercial decisions by airlines or from government practices which have a direct effect – for example, on access – or an indirect effect – for example, as a result of sanctioning some form of airline behaviour in the marketplace. While a multilateral consensus on competition policy issues is being pursued, other options for arrangements which are specific to air transport could be pursued while safeguarding the industry cooperation needed to set standards and maintain interlining worldwide so as to preserve the integrity of the global network.

16. The GATS has provisions which can be used to deal with competition and regulatory issues. Various articles are relevant, but especially those on domestic regulation (VI), monopoly and exclusive service suppliers (VIII), business practices (IX), safeguard measures (X) and subsidies (XV). These provisions, however, can only be invoked by States and in situations where States are involved, be it directly through their action (subsidies, safeguards, domestic regulation) or indirectly through their jurisdiction over service suppliers, monopolies or exclusive service suppliers. Furthermore, these provisions have generally not been tested or developed, and further attention should be given to ways of strengthening the contribution of the GATS through them.

17. The WTO Reference Paper on basic telecommunications should also be examined as a model for how competition policy issues in particular could be dealt with in air transport. This paper refers to competitive safeguards (e.g. anti-competitive cross-subsidies, denial of access to services), rules on interconnection (in the case of air transport, access to infrastructure), treatment of universal service obligations, transparency, rules on the allocation of scarce resources such as frequencies (in the case of air transport, landing slots or gates) and the value of having regulators who are independent of service providers. Similar work on other transport modes should also be examined.

18. An important suggestion by ICAO, based on its earlier work, was for States to use a safeguard mechanism on anti-competitive practices, including a dispute settlement and conciliation process which could also be applied at enterprise level.

19. ICAO can work with WTO on clarifying various regulatory practices.

20. States are invited to implement expeditiously their National Communication Navigation Surveillance and Air Traffic Management Systems(CNS/ATM), which have been included in their regional air navigation plans, so as to alleviate airport and airspace congestion and to facilitate reform of regulatory policy.

E. The regional route to reform

21. The number of active regional arrangements is increasing. There are at least 11 such arrangements in various stages of development.

22. A regional approach to reform has a number of advantages, such as the development of cooperation among participants, competition within the region, the development of service to subregions, the consolidation and restructuring of airlines, greater efficiency within the region, making a contribution to competitiveness on routes outside the region, and so on. A regional approach can also affect market access.

23. The GATS provisions in Article V apply to regional arrangements only when they are part of a larger structure which has substantial sectoral coverage. Developing countries do have some flexibility in the application of regional arrangements, but it may not be sufficient to support arrangements which apply to one sector. Some of the existing air transport arrangements are part of larger economic integration arrangements which are covered by Article V. In such cases the application of the GATS to air transport would impose disciplines on these arrangements.

24. There is not yet sufficient information to make a judgement about the effects of these arrangements. It is recommended that further work be completed on the costs and benefits of the regional approach to reform. Regional arrangements could be characterized by their rules (e.g. transparency, accession, terms of market access for non-members, human resource development, etc.), and the links between these rules and economic outcomes could be analysed. The results could be used to design some principles for this route to reform in the absence of GATS rules, or to facilitate the reporting of such arrangements to the WTO Council for Trade in Services if the GATS does apply.

F. Preparation for negotiations

25. UNCTAD, in collaboration with ICAO, its regional agencies and other relevant international and regional bodies, should work with developing countries on these options and the construction of the positive agenda.

II. CHAIRPERSON'S SUMMARY

A. Background

26. Overall, the main concern of developing countries with respect to air transport, as it emerged from discussions during the Expert Meeting, is the terms of their participation in world air transport markets. One view is that these countries will benefit from competitive international air transport markets, since markets which are competitive are more open to their participation. Competitive markets also provide services at efficient levels, which facilitates the growth of industries that use air transport services, including tourism, and those that use air freight. However, competitive markets also involve challenges. This is especially the case for airlines emerging from systems of regulation, which previously provided them with a degree of protection, and from government ownership. At the same time, the trend towards privatization has tightened the financial constraints on many flag carriers.

27. At present, international markets are subject to complex regulation based on a system of bilateral agreements. This system continues to evolve because of pressures from the market. The system also remains outside the rules of international trading arrangements. A review of the system by the World Trade Organization (WTO) is inevitable under commitments made in the Uruguay Round. The question is how to manage the transition to new arrangements. There are a number of options. The outcome is likely to involve some combination of reform from within the bilateral system, as a consequence of the imposition of the rules of the multilateral system. The latter are embodied in the General Agreement on Trade in Services (GATS), and many participants at the Expert Meeting asked how the use of GATS as a vehicle for reform would benefit developing countries. They noted the change already achieved under the bilateral system with guidance from the International Civil Aviation Organization (ICAO).

28. The bilateral system does offer access to markets, but the scope of that access is neither unlimited nor highly flexible, since it is subject to specific reciprocity. Furthermore, disagreement over the terms of access can be settled only within the bilateral structure, where bargaining power is uneven. The bilateral system is now transforming itself. There have been substantial changes in bilateral agreements. Many are now more open. Airlines are finding ways of cooperating despite the constraints imposed on them by bilateralism. Countries are experimenting with regional approaches to reform.

29. There are risks, from a policy perspective, in the current path of development of the sector, including in the emergence of new competition policy issues. The latter include the behaviour of alliances of airlines, which are becoming increasingly important, and the terms of access to critical infrastructure. There are also concerns about the emergence of new forms of discrimination even within apparently open arrangements. These include the manner in which various technical regulation processes are administered.

30. Rather than simply letting the bilateral system evolve, an alternative is to use the opportunity of the review of the GATS Annex on Air Transport Services by the WTO Council on Trade in Services to move more rapidly to a more open system based on the rules of the multilateral system. This would remove the specific reciprocity of the current arrangements and contribute to greater gains from trade in these services, as well as to more competitive markets,

but it too would have to deal with competition policy questions and with the new forms of discrimination.

31. A complete review of all the options was beyond the scope of the Meeting. The immediate priority was to contribute to an evaluation of the route to reform through GATS. The discussion by experts led to suggestions about international cooperation in the development and transformation of the bilateral system. The focus on this occasion was on the application of GATS or of the principles of GATS for this purpose. The objective was to develop a positive agenda for developing countries in that context. Reference was also made to the role that could be played by ICAO, which has had a wide-ranging technical and economic regulatory role in the air transport industry.

B. Opening statements

32. In his opening address, the **Secretary-General of UNCTAD** said that air transport services were one of the driving forces behind globalization. They were key contributors to the development of tourism services in developing countries and provided new opportunities for the export of goods and other services, including through the movement of business people. Air transport services had been pioneers in the development of electronic commerce, another force behind globalization, owing to the development of remote computer reservation systems (CRS) and global distribution systems (GDS). The timing of the Expert Meeting was very propitious, since WTO was about to undertake a review of the GATS Annex on Air Transport Services with a view to considering the possible further application of GATS in that sector and was preparing for a round of negotiations progressively to liberalize trade in services and increase the level of commitments under the Agreement. Air traffic rights and services directly related to the exercise of those rights were the only services excluded from its otherwise universal coverage.

33. He explained the main features of UNCTAD's initiative on the positive trade agenda for developing countries and stressed that the Expert Meeting was part of that initiative. Accordingly, the Meeting's conclusions could be translated into possible negotiating objectives within the framework of WTO and ICAO. The background note prepared for the Meeting by the secretariat already contained some possible elements for a positive agenda, such as the suggestions that the ancillary services already covered by GATS could be further liberalized and that more services could be brought within the schedules of commitments by extending GATS to those services currently excluded from it which were directly related to the exercise of traffic rights.

34. The review of the Annex on Air Transport Services would constitute a major test of the credibility of GATS article IV, which was aimed at increasing the participation of developing countries in trade in services. That could be achieved through improved access for developing countries to technology, information networks and distribution channels. The WTO negotiations on GATS article IX, on competition policy, and article XV, on the prevention of distortions arising from subsidies for services, would be relevant to that review process. He recalled that traffic rights were governed by a network of bilateral agreements which made the application of the most favoured nation (MFN) principle very difficult. While the bilateral agreements might have sheltered developing countries' airlines from the ravages of predatory competition, they also placed them in a situation where they had limited negotiating leverage to acquire improved market access. The Meeting could therefore offer some ideas on how the MFN principle could be applied

to traffic rights, an area in which the most constructive ideas had come from ICAO. Its nine preferential measures, if applied on a universal and contractual basis, could serve to compensate for the weaker position of developing countries in bilateral negotiations on improved market access.

35. The **Secretary-General of ICAO** stressed the contribution of air transport to economic progress and development. It was not a viable option for developing countries to leave the provision of reliable services and connections to the disciplines and consequences of the international market place. The guiding principles of the Chicago Convention, which represented ICAO's constitution, were non-discrimination, transparency and equality of opportunity. ICAO focused its efforts on establishing minimum standards for safety and security, but it also anticipated and responded to needs across the whole air transport spectrum. Air transport was a fast-moving business where technology, marketing and service delivery were constantly pushing towards new horizons. Traditionally, most Governments not only set policy and regulated the air transport sector but also acted as service providers. However, they were rethinking their regulatory function and role as service providers.

36. He summarized some of the most important initiatives in which ICAO had been involved and which had the efficiency, growth and safety of commercial air transport as their rationale. ICAO had taken an extremely complex and far-reaching initiative to transform the communications, navigation, surveillance and air traffic management aspects of aircraft in flight from a ground-based to a satellite-based system. A global aviation safety plan was being carried out to evaluate the implementation of ICAO's minimum standards. The organization had developed a fully operational mechanism of assistance and training for States to combat unlawful interference with civil aviation, such as hijacking. An initiative had been taken to broaden the sources and mechanisms for funding the aviation infrastructure, especially in developing countries. ICAO was developing guidance to help countries adapt their economic regulatory responsibilities to a globalizing, privatizing and liberalizing world and an increasingly competitive market place.

37. The sector's expansion could lead to new problems. In the coming decade it would face an enormous demand for investment in infrastructure and in the replacement of equipment. The question was not whether to pursue liberalization but how. Every country would approach liberalization at its own pace and in accordance with its needs and circumstances, with economic progress as the final goal. The sector depended heavily on global cooperation, coordination and competition, and the challenge was to establish the best mix of those factors for each particular circumstance.

38. The **Director-General of the International Air Transport Association (IATA)** explained why there was a limited coverage of air transport services in GATS 1995. Negotiators had recognized that international air transport operated through a system of over 3,500 bilateral agreements. That framework had proved sufficiently flexible to allow for the development of consumer-responsive services to increase competition and to foster the continued cooperation needed to run a global system covering 190 countries and serving 1.5 billion passengers a year. The airline industry did not want a dual regulatory regime, with some States applying GATS obligations and others holding to existing arrangements. It wanted to keep the freedom to apply agreements based on reciprocity, not on the MFN principle. Moreover, if new trade concepts were to be applied to air transport, ICAO, as the competent United Nations agency involved, was

best qualified to take into consideration the industry's peculiarities, regulatory arrangements and structures. A compromise solution had thus been sought and a separate annex on air transport concluded, covering only three ancillary services – aircraft repair and maintenance, the sale and marketing of air transport services, and computer reservation system services ("soft rights") – and excluding routes, traffic rights, capacity, ownership and control ("hard rights").

39. Substantial progress had been made in the liberalization of air transport even without the multilateral approach of GATS, through bilateral, plurilateral and regional arrangements, which had resulted in crucial market changes. There was, however, widespread agreement at the government level and throughout the airline community on the need further to liberalize aviation markets, and in that regard the fundamental challenge was to find the best way for the industry to move forward and to determine whether the WTO/GATS approach offered the best solution. A critical component would be the attitude of developing countries, whom the industry believed would use air transport services for bargaining purposes in other sectors, thereby benefiting the countries but not the carriers.

40. He drew the following conclusions:

(a) The aviation community had to become more familiar with GATS and trade negotiators with the specifics of air transport;

(b) A better understanding of what was already included in GATS and a clearer classification of services were needed;

(c) Emerging non-economic obstacles had to be addressed on the basis of the Annex on Air Transport Services;

(d) Bilateral agreements were still useful instruments but they could not be used ad infinitum;

(e) The industry had a strong preference for air transport services to be dealt with on a sectorial basis;

(f) The forthcoming Millennium Round offered the opportunity to examine what obstacles existed and whether GATS could help in solving them; and

(g) If hard rights were brought into GATS, the emerging dual regime would be extremely difficult to manage.

41. The approach of the Millennium Round had reopened the debate on the liberalization process and challenged the industry to think constructively about how a multilateral regime or a combination of regimes could be used to pursue liberalization under a predictable set of rules. IATA planned to formulate a revised position in time for the start of the new negotiations and was searching for the best way to further the liberalization of air transport.

C. Informal discussions

42. The discussions at the Expert Meeting revolved around three main themes: the contribution and coverage of GATS; competition policy issues; and bilateral agreements and regional initiatives.

1. Contribution and coverage of GATS

43. Even though only three areas are included in the GATS Annex on Air Transport Services, the so-called soft rights, experts concurred that liberalization has been taking place in all areas and that the results of the forthcoming review of the Annex will have to be approved by consensus. Commitments have been limited in those three areas, and exemptions have outnumbered the commitments. Any improvement in market access will have to come from improved commitments.

44. While liberalization of the air transport sector is the long-term objective, many experts argued that countries should be able to pursue it at their own rate. They also referred to the preferential measures developed by ICAO as a model to be considered for facilitating the implementation of reforms. Any preferential measures in favour of developing countries should, however, be time-limited.

45. The effective participation of developing countries in the negotiations on services, and in the review of the Annex, will depend on the active involvement of their air transport authorities. Developing countries should have a clear vision and be aware of what should be expected in every segment of the air transport services, as market access will be further opened to competitive suppliers. Technical cooperation extended by WTO to developing countries under article XXV should help build their understanding. Some experts from developing countries asked for increased technical assistance in training and equipment, including new safety equipment.

46. Changes in the structure of the air transport industry may bring confusion and conflicts, making dispute settlement an increasingly relevant issue. There are at present several layers of dispute settlement: arbitration is usually included in the bilateral agreements, ICAO has developed a procedure for conflict resolution, and the WTO dispute settlement procedure is available for the sectors included in the Annex.

47. Experts called for accuracy in the use of the GATS terminology, with one expert requesting a clear definition of "specialized services" and "airport slots" as well as the *identification of leasing, catering, fuelling and airport services for the air transport services sector*. A detailed definition of the sector, in use by the industry and Governments, has been established by ICAO, but definition issues are complicated by the constant changes in the industry itself. Concerning GATS, however, experts were of the view that there was more than one possible interpretation of which ancillary services were covered by the Annex (e.g. with respect to ground handling services). Duality in defining hard and soft rights in GATS and in the industry might serve only to further complicate the debate, and clarity should thus be sought on a definition at the outset. In general, GATS followed a flexible approach that allowed members to deviate from agreed definitions in services negotiations if doing so enabled them to be more precise in their

commitments. The debate on definitions could focus not only on what was included in the Agreement, but also on what was excluded from it.

48. In addition, the notion of a "supply of service" in GATS terms might not be applicable in the present case without modification, as it covered the production, distribution, marketing, sale and delivery of service. Marketing and sales in the aviation industry were treated as separate components and were not part of the supply of air transport services.

49. On the other hand, GATS and commitments by countries in other service sectors already covered related services, such as leasing, catering and so forth. If GATS disciplines were to apply to air transport services, and if commitments on these related services extended to air transport services, agreement would be needed. The same would apply to exemptions under article II of GATS (MFN exemptions), since agreement should be reached on applying MFN derogation to air transport services. Recourse to MFN exemptions might be sought on the grounds that it would facilitate the transition from a bilateral to a multilateral framework. Developing countries had benefited from the flexibility accorded to them through the system of bilateral agreements. The only way for them to maintain reciprocity under the GATS framework would be to include reciprocal arrangements in the MFN exemptions. The treatment of cabotage and how MFN treatment would extend to it also merited attention, and in that regard the experience of maritime transport could be of use.

50. Another pertinent aspect was the comparison of the treatment of ownership in GATS with the practice adopted in the industry. The aviation industry in its international practice requires a definition of substantial ownership and effective control. In addition, treatment of ownership in domestic legal systems differs from one country to another. Effective control is most important, but its definition poses problems and retains a high degree of subjectivity. It could also be achieved with a golden share of 1 per cent ownership. Contrary to the maritime industry, where service suppliers had opted for flags of convenience, it was argued that the link between nationality and flag was particularly important in the air transport sector, for example, because of safety and liability issues. However, market trends reflected an increasing need for flexibility in choosing a location from which to supply air services. Ownership would have to be defined in industry-specific terms if GATS disciplines were to apply to the sector.

51. The movement of people across borders posed problems for developing countries, making negotiations on mode 4 an important issue. GATS article VII was also relevant for air transport services, as it related to the recognition of crew members' qualifications. On the other hand, domestic regulation on licensing legal persons was covered by GATS article VI. Some experts were concerned at the application of the general disciplines to the air transport services in accordance with that article, so as not to compromise existing safety standards. They argued that ICAO could maintain its primordial role as a standard-setting body in the air transport sector in a way that was fully compatible with GATS. Thus, the application of the GATS general disciplines developed under article VI should not be incompatible with the standards established by ICAO, including those on safety. In addition, countries might rely on GATS general exceptions regarding safety, as covered by article XIV. Delays in the issuance of licences acted as an effective barrier to the supply of air transport services, an issue addressed in part in article VI.3.

52. A set of options for liberalization was presented by ICAO:

(a) Leave the GATS Annex in its present form, encourage WTO members to increase the number of commitments in the subsectors covered by the Annex and remove existing exemptions;

(b) Clarify the exact scope of the sectors covered by the Annex and expand its coverage by being more specific: if the subsectors were clearly defined, the coverage of the Annex could be extended to all subsectors that did not fall strictly within the terms "traffic rights" and "services directly related to the exercise of traffic rights";

(c) Expand the coverage of the Annex to include, in particular, all cargo and non-scheduled services, as they are generally less regulated under the present bilateral framework and pose fewer strategic problems;

(d) Expand the coverage of the Annex to include the whole air transport sector, in order to accommodate its particular features;

(e) Achieve liberalization through unilateral expansion, which would imply the use of GATS as a liberalization mechanism for unilateral and non-negotiated commitments: this would allow the limited coverage of air transport to be retained but at the same time permit countries to inscribe full traffic rights in their schedules voluntarily and unilaterally, with or without the condition of reciprocity;

(f) Leave the liberalization process to the bilateral and regional agreements and give GATS the role of setting disciplines in the air transport sector only insofar as subsidies, the participation of developing countries, consultation on restrictive business practices and so on are concerned.

53. Experts noted that work was still ongoing to develop a number of GATS disciplines, such as subsidies, safeguards and government procurement, and that any modification that could be agreed on the substantive norms of the Agreement, and the development of new disciplines within its framework, would affect further commitments in air transport services.

2. Competition policy issues

54. The air transport industry is a high-technology and highly capital-intensive industry. It is also very innovative, undergoing transition, and increasingly globalized. It has three distinctive characteristics:

(a) *The sovereignty principle*, which is the basis for the strong nationality factor in air transport. Sovereignty is the cornerstone of the Chicago Convention, which states that every State has complete and exclusive sovereignty over the airspace above its territory. The emphasis on sovereignty has encouraged a bilateral approach to market access. The sector has also developed around the concept of the national carrier. Because of this, air transport markets are bilaterally focused, and

reciprocity is an intrinsic practice in many respects. As a consequence of the national, bilateral and reciprocal framework, many markets tend to be either monopolies or duopolies, or at best oligopolies in competition terms;

(b) *A self-contained governing regulatory system based on bilateralism.* However, the limited world of bilateralism is expanding, because of the emerging phenomenon of regionalism and because of the inclusion in bilateral agreements of the interests of the trade and business community, the tourist community and consumer groups, as opposed to the sole consideration of the policy interests of the Government and the national carrier;

(c) *Expectation of participation,* which finds expression in the concept of the national carrier. Nearly all countries see participation as a strategic necessity, although many developing countries with small markets and limited resources are having to confront the problem of how to participate in international air transport and how to ensure reliable service to trade partners and essential markets. New forms of indirect participation, such as franchising and contracting out, may help to address the participation issue. Alliances can be used to achieve or maintain direct participation where Governments cannot support national airlines. Notwithstanding the nationality factor, airlines, which were once arms of government, have been forced into a commercially driven environment either as privatized or at least profit-motivated carriers.

55. The above-mentioned changes have brought new issues to the fore, such as the application of competition laws, industry concentration, foreign investment participation, consumer protection, and interconnection between rival GDS and CRS. While a multilateral consensus on competition policy issues is being sought, other options for arrangements which are specific to air transport could be pursued, at the same time safeguarding the industry cooperation needed to set standards and maintain interlining worldwide so as to preserve the integrity of the global network.

56. Discussion also focused on the fact that airlines have been undergoing a process of privatization during the past 10 years, with some regions (such as Africa) just beginning the process and others (such as the Americas) having already acquired a great deal of experience. Privatization is obviously not mandatory, but it is one way to leave air transport to the private sector, which may be in a better position to manage it than Governments. The privatization of airlines in developing countries is often part of broader national privatization strategies or of structural adjustment programmes.

57. There are at present more than 600 alliances, all very different from one another. There are also five mega-alliances which are extremely powerful in the market. Alliances are the result of airline strategies. They reflect the globalization process that the air transport sector is undergoing. At present, however, they do not usually involve equity linkages or cross-holdings. Regulators are facing problems in dealing with alliances, since they have to regulate from a national standpoint a phenomenon which is international in nature. Their main concerns seem to be with the approval of individual alliances and the granting of anti-trust immunity. Members of the alliances act as a single entity. For airlines from developing countries, joining an alliance could

be a way to survive. However, alliances are "marriages of convenience", meaning they can be dropped or modified if they do not provide the members with the benefits they are expecting. One expert warned that when alliances include airlines with considerable disparities in size, resources, market power and access to finance and technology, they might entail risks for the weaker partners. In the case of Africa, for example, airlines are going through the process of privatization and becoming involved in alliances, but they are also becoming too dependent on foreign capital and companies.

58. Experts considered that the WTO negotiations on basic telecommunications could be analysed to see whether lessons could be learned that could be applied to the air transport sector. One of the problems addressed in the telecommunications sector, for example, was access to the grid, which is similar to access to airport slots. The portability of numbers in that sector resembles the portability of reservation numbers in air transport.

59. The application of constraints on the use of subsidies is an area where progress could be made.

60. There are two factors likely to limit the expansion of air transport: air congestion and airport congestion, and environmental concerns. In the European Union, the latter considerations are becoming increasingly important, and environmental groups are calling for limits to be imposed by economic instruments on the expansion of international air transport because of its contribution to environmental damage. These two elements might hamper the expansion of the air transport sector, despite liberalization efforts.

61. Safety standards and practices have to be kept in mind in any liberalization policy and should receive priority over any other consideration. ICAO has developed a large set of minimum safety standards.

62. Regulations that would secure a competitive environment in air transport services with an underlying institutional framework in each developing country are necessary if the liberalization of market access is to proceed. The availability of an emergency safeguard mechanism as a temporary fallback option could also support efforts by developing countries further to open their air transport services markets to competition. The development of such a mechanism would probably be less problematic in air transport services than in other service sectors, if only for reasons of quantification. Quantitative restrictions could be imposed, such as a limitation of frequencies.

3. Bilateral agreements and regional initiatives

63. The concept of full market access, where traffic rights are unrestricted to, from and beyond the territories of the partners, is now included in over 50 of the 3,500 bilateral agreements that currently regulate air transport. While this number is very small compared with the total number of agreements, its importance lies in its coverage and in its consequences for other markets. Open agreements can achieve instant market access and therefore do not imply progressive liberalization, but as they are limited to market access, they do not address such issues as right of establishment, foreign direct investment or cabotage.

64. The United States has concluded 35 of its own type of "open-skies" agreement, and was the initiator of this approach to reform. Other countries, including developing countries such as Malaysia, have also concluded this kind of agreement. Peru has signed an open-skies agreement with the United States, although the agreement has not produced the expected results. A similar agreement with the Netherlands, on the other hand, is functioning properly and is providing Peru with opportunities in tourism and trade. Bolivia has concluded open-skies agreements with the other members of the Andean Pact and with Cuba.

65. There are at present 11 air transport initiatives at the regional level at various stages of development. These initiatives vary greatly, ranging from agreements already in force to mere plans of action for the future. The preliminary evaluation of the regional initiatives seems to be positive, and ICAO is viewing them with optimism as tools to achieve further liberalization of the sector. However, one expert at the Meeting stressed the risk that regional agreements might create trade barriers for third parties, who might find it difficult to extract concessions. Experience has shown that if a high political profile is given to the conclusion of a regional agreement, it has a greater chance of success. According to the ICAO definition, plurilateral agreements are agreements negotiated by certain countries which are open for accession by other countries.

66. The European Union's arrangements with regard to air transport were singled out by experts as the most sophisticated of the regional initiatives, but they are not yet complete. Arrangements in the sector are often related to broader economic integration schemes aimed at trade liberalization within the same economic space. Developing countries view the creation of regional integration in the sector as a way to improve their negotiating position in agreements reached on market access with developed countries. So far, in many instances members of the regional blocs have been negotiating fifth-freedom rights individually and not as a bloc. However, regional groupings could develop internal rules with respect to cabotage, which would not extend to routes negotiated bilaterally. In negotiating with third parties, it was the latter who often had problems accepting the framework of negotiations with a bloc on code-sharing, ownership and the like. Developing countries are seeking to proceed with further integration, as they believe such processes in the European Union have been excluding them and preventing their carriers from improving their share of that market. Countries in the Andean Pact are seeking to expand their open-skies agreement to third countries.

67. South Africa, Uganda and the United Republic of Tanzania set up a common regional airline in 1995 for the purpose of consolidating the market in the region and developing a regional hub. This regional alliance might consider joining larger alliances in the future. Being regional, it will probably be in a better position to negotiate the terms of its participation in a larger alliance. The three member countries of the alliance negotiate together, have a common strategy and speak with one voice. Eleven African States have united to create a single air space and have designated a single agency to conduct negotiations on their behalf. Such a grouping might have a more restrictive impact, since all third-country travel is treated as cabotage within it.

68. The Agreement of Fortaleza was concluded in 1997 by six South American countries. It applies only to those routes not covered by bilateral agreements, or to routes covered by bilateral agreements which lie dormant because the circumstances have changed or because the markets are too thin in terms of available traffic or are economically unviable to develop or operate.

69. Treatment of ownership has been evolving in the regional setting, where single ownership is becoming less important. Shared resources and joint ownership in the supply of services mean that the definition of ownership can be treated less rigidly in regional arrangements. If this trend continues, it will mean that the treatment of ownership might end up being less different from treatment in other services sectors. Liberalization of investment regimes and sharing of resources are the first steps towards evolution in the treatment of ownership. Safety issues remain important and could be addressed through the designation of a country of jurisdiction.

70. In formulating their agreed conclusions, experts decided they should be seen as a set of issues which would guide further work by member countries as they prepared for the negotiations on services. A number of speakers stressed the difficulties created by the transition from the current system, focused on ICAO, to a system of trade-related issues managed according to GATS principles. It was not yet clear what sorts of legal issues would arise, since a great deal of legislation was based on policy developed in ICAO processes. Further consideration of that question by legal experts would be helpful.

71. A related issue was what was described as the "institutional scramble". Many organizations and regional groupings, including WTO, UNCTAD, the Organisation for Economic Cooperation and Development (OECD) and the European Union, are taking an interest in air transport but are working separately. One view was that ICAO had to be the focal point for work on regulatory reform in this sector; ICAO would then have to bring in the trade elements. The role of UNCTAD also needed further thought and elaboration.

72. Experts also considered a variety of routes to reform. Some of them considered that one likely route would be an evolution from the restrictive bilateral agreements to more open arrangements within regional groupings, leading to the creation of multilateral structures. Routes to reform within the GATS framework were also discussed. One suggestion was to focus on modes of supply, and to stress those modes that were excluded and those that were included. Other experts drew attention to the value of focusing instead on subject areas, such as cargo.

73. Another idea put forward was to begin by developing trade in soft rights, which could be done by extending the coverage of paragraph 3 of the Annex. As a number of experts pointed out, however, that would require in the first instance a more elaborate definition of air transport activity. If that approach was to be pursued, the line had to be drawn between those services included in paragraph 2 of the Annex (the present wording refers to traffic rights and services related to traffic rights) and those not included.

74. Some participants argued that it would be premature to begin considering hard rights. Such an opening up of the market was described as "scary". Industry representatives noted the common concerns among airlines of being over-hasty but also recognized that the implications of such options would have to be considered analytically, in order to respond effectively to the review of the treatment of air transport in the GATS. Developing countries would have to articulate their concerns and introduce them into the debate.

75. If hard rights were to be considered, then transitional arrangements would also have to be discussed. In that context, the experts debated the relevance of GATS article IV, which refers

to the increasing participation of developing countries in trade in services. A statement was made on the value of a study of the implementation and effectiveness of that article.

76. Several experts reiterated the value of a focus on competition policy, arguing that liberalization that ignored competition policy issues would not work. At the same time, however, dealing with such issues would also require the strengthening of national competition policy institutions.

77. There was considerable discussion on the issue of exemptions from anti-competitive practices. Industry representatives believed that inter-firm cooperation in the industry provided important public benefits, such as those related to interlining. Other participants remained concerned about the implications of immunity from the application of anti-trust law. Such immunity was available in some cases in relation to alliance agreements, and was granted subject to the establishment by alliance members of offsetting public benefits – benefits which might offset any restrictive effects of the implementation of such agreements. In the view of some experts, States should be invited to consider establishing transitional periods for the elimination of sectoral exemptions to anti-competitive conduct in air transport which had effects in international markets. There was, however, no consensus on that matter. Such exemptions need to be carefully examined in the context of the application of competition policy to the industry, and it will be a particularly difficult challenge to deal with those exemptions that have effects across national borders.

78. With regard to the use of the Reference Paper on Basic Telecommunications as a model for managing competition policy issues in air transport, which was endorsed by the experts in their agreed conclusions (see section I above), the question was raised as to whether the linking of CRS was an example of the "access to infrastructure" set of issues mentioned in the paper. One view was that the use of CRS was a business practice issue, and that interlinking those systems was not critical for the presence of competitive markets. Another view was that such links were indeed critical and that there was a close analogy to the situation where telecommunications service suppliers needed to have access to the fixed-line network in order to enter the market. Clearly, the perception remains that important competition policy issues are involved in CRS ownership and control and that this is a topic for further empirical work.

III. ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

79. In accordance with the recommendation made by the Commission on Trade in Goods and Services, and Commodities at the closing meeting of its third session, on 2 October 1998,[2] the Expert Meeting on Air Transport Services: Clarifying Issues to Define the Elements of the Positive Agenda of Developing Countries as regards both the GATS and Specific Sector Negotiations of Interest to Them was held at the Palais des Nations, Geneva, from 21 to 23 June 1999. The meeting was opened on 21 June by Mr. Rubens Ricupero, Secretary-General of UNCTAD.

B. Election of officers

(Agenda item 1)

80. At its opening meeting, the Expert Meeting elected the following officers to serve on its bureau:

Chairperson:	Mr. Christopher Findlay	(Australia)
Vice-Chairperson-cum-Rapporteur:	Mr. Mustapha Chaouki	(Tunisia)

C. Adoption of the agenda

(Agenda item 2)

81. Also at its opening plenary meeting, the Expert Meeting adopted the provisional agenda circulated in TD/B/COM.1/EM.9/1. Accordingly, the agenda for the Meeting was as follows:

1. Election of officers

2. Adoption of the agenda and organization of work

3. Clarifying issues on air transport services to define the elements of the positive agenda of developing countries as regards both the GATS and specific sector negotiations of interest to them

4. Adoption of the outcome of the Meeting

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[2] See Report of the Commission on Trade in Goods and Services, and Commodities on its third session (TD/B/45/10-TD/B/COM.1/22), paragraph 83 (c).

D. Documentation

82. For its consideration of the substantive agenda item (item 3), the Expert Meeting had before it a report by the UNCTAD secretariat entitled "Air transport services: the positive agenda for developing countries" (TD/B/COM.1/EM.9/2).

E. Adoption of the outcome of the Meeting

(Agenda item 4)

83. At its closing plenary Meeting, on 23 June 1999, the Expert Meeting adopted the agreed conclusions reproduced in section I, and authorized the Chairperson to prepare a summary of the informal discussions (see section II above).

Annex

ATTENDANCE*

1. Experts from the following States members of UNCTAD attended the Meeting:

Argentina
Australia
Bolivia
Brazil
Burkina Faso
Cameroon
Chile
China
Comoros
Côte d'Ivoire
Cuba
Dominican Republic
Egypt
Ethiopia
France
Guatemala
Guinea
India
Indonesia
Iran (Islamic Republic of)
Italy
Japan
Kenya
Libyan Arab Jamahiriya
Madagascar
Malawi
Mali
Mauritania
Mexico
Morocco
Namibia
Netherlands
Niger
Nigeria
Oman
Pakistan
Paraguay
Peru
Philippines
Russian Federation
Sri Lanka
Sudan
Switzerland
Thailand
Tunisia
Turkey
Turkmenistan
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Zimbabwe

2. The following intergovernmental organizations were represented at the Meeting:

African, Caribbean and Pacific Group of States
Arab Labour Organization
Economic Community of West African States
European Community
Organisation for Economic Co-operation and Development
South Centre
World Tourism Organization

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* For the list of participants, see TD/B/COM.1/EM.9/INF.1.

3. The following specialized agencies and related organization were represented at the Meeting:

International Labour Organization
International Civil Aviation Organization
International Monetary Fund
World Trade Organization

4. The Economic Commission for Africa and the International Trade Centre UNCTAD/WTO were represented at the Meeting.

5. The following non-governmental organizations were represented at the Meeting:

General Category

World Federation of United Nations Associations
World Vision International

Special Category

International Air Transport Association

6. The following organizations, specially invited by the secretariat, attended the Meeting:

African Airlines Association
International Federation of Airline Pilots Associations

Speakers

Mr. John Gunther, Chief, Economic Policy Section, International Civil Aviation Organization
Mr. Pierre J. Jeanniot, Director General, International Air Transport Association
Mr. Pierre Latrille, Counsellor, World Trade Organization
Mr. Renato Claudio Costa Pereira, Secretary-General, International Civil Aviation Organization

Special Guest

Mr. François Vellas, University of Toulouse, France